Noresah bte Lani v RHB Bank Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–1370 OF 2005
ABDUL WAHAB SAID AHMAD J
19 APRIL 2006

Banking — Banker and customer — Claim for amount outstanding under banking facility — Dispute on arrears — Whether customer entitled to be supplied statement of account from date of commencement of loan

Civil Procedure — Injunction — Balance of convenience — Plaintiff's loss could not be compensated by damages — Whether injunction should be granted

The plaintiff had entered into a loan agreement cum assignment with Kwong Yik Finance Bhd ('Kwong Yik') on 11 May 1991 for a housing loan of RM107,000. Subsequently all of Kwong Yik's rights had been vested in the defendant. In view of the vesting, the plaintiff had on 11 February 2003 made inquiries to the defendant about the status of the loan. Upon the request of the defendant, the plaintiff also forwarded a copy of the letter of offer from Kwong Yik on 18 February 2003. On 22 February 2003, the defendant wrote to the plaintiff claiming for the amount of RM2,777.21, purportedly arrears as at 25 November 2002. The plaintiff promptly replied saying that there were no arrears outstanding and requested that the defendant supply her with a statement of accounts from the commencement of the loan. The defendant did not send any clarification, so the plaintiff sent a reminder dated 29 September 2003. Even though the defendant had failed to send any clarification or send any statement of accounts, the defendant sent a notice of demand dated 16 December 2003 for RM5,811.26. The plaintiff denied the debt by letter dated 26 December 2003. The plaintiff sent another letter dated 25 February 2004 for a clarification. The defendant did not reply but reciprocated by sending a notice of recall dated 25 November 2004 claiming for the entire loan amount, including interest and late payment charges that came up to RM124,050.64. The defendant also filed an action in the sessions court for the loan amount.

The plaintiff filed this application for: (1) an injunction to restrain the defendant from selling the plaintiff's property, by way of public auction, foreclosure or in whatever manner; (2) an order that the defendant within 14 days from the date of the order supply the plaintiff with monthly statements of the loan under the agreement between the plaintiff and Kwong Yik Bank Bhd from the date of commencement of the loan until the date of the order; and (3) an injunction to restrain the defendant from proceeding with the case in the sessions court until the disposal of this case.

Held, allowing the plaintiff's application:

(1) This was not a situation where the plaintiff had been in total neglect, default or failure to pay the instalments. The defendant in its affidavit had admitted that the plaintiff had been paying. She had paid before and after the rights in Kwong Yik Bank Bhd was vested in the defendant. The payment had not been so regular when at one stage there was a variation in interest rate and at a later stage the instalment was increased. There was thus a serious question to be tried in that the defendant had insisted time and again that it was not obliged to supply the plaintiff with the statement of accounts that she had requested (see para 19).

(2) The balance of convenience lies in favour of granting this injunction since the loss to the plaintiff's property if it were to be auctioned off could not be compensated by damages. On the other side of the divide the plaintiff was not being unreasonable in her claim for the defendant to supply her with the statement of accounts from the time that the loan was granted by Kwong Yik Bank Bhd. The court agreed with the plaintiff that in the absence of the detailed statement of accounts dating back to the time before the vesting took place, the auction, if it had been allowed to proceed, would not be right in law since the redemption statement would not be accurate (see para 20).

[Bahasa Malaysia summary

Plaintif telah memasuki satu perjanjian pinjaman termasuk satu tugasan dengan Kwong Yik Finance Bhd pada 11 Mei 1991 bagi satu pinjaman perumahan sebanyak RM107,000. Kemudiannya, kesemua hak-hak Kwong Yik telah terletak hak pada defendan. Dalam hal peletakan hak, plaintif telah pada 11 Februari 2003 membuat pertanyaan kepada defendan tentang status pinjaman tersebut. Atas permintaaan defendan, plaintif telah menghulurkan satu salinan surat tawaran dari Kwong Yik pada 18 Februari 2003. Pada 22 Februari 2003, defendan telah menulis kepada plaintif menuntut sebanyak RM2,777.21 yang dikatakan tunggakan pada 25 November 2002. Plaintif telah menjawab dengan tepat menyatakan bahawa tiada terdapat tunggakan yang belum dijelaskan dan meminta supaya defendan memberikannya satu penyata akaun dari permulaan pinjaman tersebut. Defendan tidak menghantar sebarang penjelasan jadi plaintif telah menghantar satu peringatan bertarikh 29 September 2003. Walaupun defendan telah gagal menghantar satu penjelasan atau sebarang penyata akaun, defendan telah menghantar satu notis tuntutan bertarikh 16 Disember 2003 bagi RM5,811.26. Plaintif telah menafikan hutang melalui surat bertarikh 26 Disember 2003. Plaintif telah menghantar satu lagi surat bertarikh 25 Februari 2004 bagi satu penjelasan. Defendan tidak menjawab tetapi membalas dengan menghantar notis pemanggilan bertarikh 25 November 2004 menuntut kesemua jumlah pinjaman termasuk bunga dan bayaran caj lewat yang berjumlah RM124,050.64. Defendan juga telah memfailkan satu tindakan di mahkamah sesyen bagi jumlah pinjaman. Plaintif telah memfailkan permohonan ini bagi (1) satu injuksi untuk menyekat defendan daripada menjual harta plaintif melalui satu pelelongan awam, perampasan atau dalam apa-apa cara; (2) satu perintah di mana defendan dalam masa 14 hari dari tarikh perintah memberi plaintif penyata bulanan pinjaman tersebut

antara plaintif dan Kwong Yik Bank Bhd dari tarikh permulaan pinjaman sehingga tarikh perintah tersebut; dan (3) satu injuksi untuk menyekat defendan daripada menerus dengan kes di mahkamah sesyen sehingga penghapusan kes ini.

Diputuskan, membenarkan permohonan plaintif:

(1) Ini bukan merupakan situasi di mana plaintif telah cuai atau gagal untuk membayar secara ansuran. Defendan di dalam afidavitnya telah mengaku bahawa plaintif telah membayar. Beliau telah membayar sebelum dan selepas hak-hak di Kwong Yik Bank Bhd telah terletak hak pada defendan. Bayaran tidak seperti biasa apabila pada satu tahap terdapat satu variasi dalam kadar bunga dan pada tahap kemudiannya bayaran ansuran tersebut telah dinaikkan. Wujud satu persoalan yang serius untuk dibicarakan di mana defendan menginginkan masa dan sekali lagi bukan obligasinya untuk memberikan plaintif penyata akaun seperti yang dimintanya (lihat perenggan 19).

(2) Imbangan kesesuaian adalah terletak pada pihak di mana injuksi perlu diberikan sejak kehilangan pada harta plaintif jikalau harta tersebut perlu dilelong dan tidak dapat diganti dengan ganti rugi. Pada hal lain, plaintif adalah tidak munasabah di dalam tuntutannya terhadap defendan untuk memberinya penyata akaun dari masa pinjaman tersebut diberikan oleh Kwong Yik Bank Bhd. Mahkamah telah bersetuju dengan plaintif bahawa dalam ketiadaan penyata akaun di mana masa tarikh adalah lampau iaitu sebelum peletakan hak, pelelongan, jikalau dibenarkan berterusan adalah tidak patut dari sisi undang-undang semenjak penyata penebusan adalah tidak tepat (lihat perenggan 20).]

Notes

For cases on claim for amount outstanding under banking facility, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1809–1813.

For cases on balance of convenience, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2577–2582.

Jennifer Chandran (Vaasan Chan & Chandran) for the plaintiff.
Annon Xavier (S K Kee with him) (Lee Swee Seng & Co) for the defendant.

Abdul Wahab Said Ahmad J:

[1] The plaintiff filed an application in encl 4 for an injunction to restrain the defendant from selling the plaintiff's property known as Unit No 211, Storey 3 of Building No W, Road SS 15/8, Phase SJ85, My Place, with an address at 211W, Jalan SS 15/8, 47500 Subang Jaya, by way of public auction, foreclosure or in whatever manner. The plaintiff also prays for an order that the defendant within 14 days from the date of the order supply the plaintiff with monthly statements of the loan under the agreement between the plaintiff and Kwong Yik Bank Berhad dated 11 May 1991 from the date of commencement of the loan until the date of the order. Further, the

A plaintiff prays for an injunction to restrain the defendant from proceeding with the case in Kuala Lumpur sessions court No 8–52–15686–2005 until the disposal of this case.

[2] The plaintiff had entered into a loan agreement cum assignment with Kwong B Yik Finance Bhd ('Kwong Yik') on 11 May 1991 for a housing loan of RM107,000. Subsequently, all of Kwong Yik's rights had been vested in the defendant. In view of the vesting, the plaintiff had on 11 February 2003 made inquiries to the defendant about the status of the loan. The defendant had required the plaintiff to forward a copy of the letter of offer from Kwong Yik. The defendant did supply the letter of C offer on 18 February 2003. On 19 February, the defendant wrote to the plaintiff saying that they are looking into the plaintiff's inquiry.

[3] On 22 February 2003, the defendant wrote to the plaintiff claiming for the amount of RM2,777.21 purportedly arrears as at 25 November 2002. The plaintiff D promptly replied saying that there are no arrears outstanding and requested that the defendant supply her with statement of accounts from the commencement of the loan. The plaintiff had by her letter dated 29 April 2003 requested to see the defendant's officer about the account. The defendant did by its letter dated 29 April 2003 request that the plaintiff see its officer. During the meeting, the officer said that E the Bank will give a clarification as to the plaintiff's account status.

[4] The defendant did not send any clarification, so the plaintiff sent a reminder dated 29 September 2003. Even though the defendant has failed to send any clarification or send any statement of accounts, the defendant sent a notice of F demand dated 16 December 2003 for RM5,811.26 The plaintiff denied the debt by letter dated 26 December 2003. The plaintiff sent another letter dated 25 February 2004 for a clarification. The defendant did not reply but reciprocated by sending a notice of recall dated 25 November 2004 claiming for the entire loan amount, including interest and late payment charges that came up to RM 124,050.64.

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[5] The plaintiff by her solicitors' letter dated 22 December 2004 disputed that there are any arrears outstanding that would entitle the defendant to terminate the agreement and asked the defendant to withdraw the notice of recall. At the same time when the plaintiff wanted to make payment at the defendant's branch in One Utama, she was prevented from doing so and was directed to the branch that handled her H loan. The officer there asked the plaintiff to restructure the loan but the plaintiff refused. On 8 July 2005, the defendant sent a letter asking the plaintiff to deliver vacant possession of her property and that the defendant is going to auction it off. She was also informed that the strata title had been issued and was told to sign it; otherwise the defendant will sign it and proceed with the sale. At the same time the I defendant filed an action in the Kuala Lumpur sessions court for the loan amount.

[6] The plaintiff said that the defendant should not be allowed to proceed with the sale because the redemption statement would not be correct, in view of the fact that it had failed to supply the plaintiff with the statement of accounts when requested.

[7] The defendant in its affidavit-in-reply stated that the rights of Kwong Yik Bank Berhad were vested to RHB Finance Berhad (previously known as DCB Finance Berhad) through an order of the High Court of Kuala Lumpur in ex parte originating summons No D1–24–155–97 dated 23 June 1997. The rights of RHB Finance Berhad was then vested to the defendant through ex parte originating summons No D2–24–279–98. The defendant contended that the plaintiff had admitted this since she had continued paying to the defendant.

[8] The defendant stated that at all material times the plaintiff had defaulted in payment but had failed or refused to pay the amount owing. In view of this, the defendant contended that it is not obliged to supply the plaintiff with all the statement of accounts when it is the plaintiff's duty to ensure that she makes the repayment according to the current rate of interest monthly.

[9] The defendant contended that if the plaintiff had been paying regularly it would have sent the statement of accounts every month and the amount accrued would have been clearly stated. It was said to be an implied term that if the plaintiff wanted to raise any discrepancies, she should have contacted the defendant within 14 days. The plaintiff claims that it had informed the plaintiff of any amount owing and any variation in interest by letter ('CCY-2').

[10] Referring to the said exhibit the defendant said that the plaintiff had been informed a total of four times about the variation in interest rates. By a letter dated 4 September 1991, the plaintiff was informed of an increase in interest rate from 8.25% to 10.25%. By a letter dated 8 January 1992 from 10.25% to 10.50%. By a letter dated 16 June 1992 from 10.50% to 11.0%. Lastly by a letter dated 4 August 1992 the plaintiff was informed that because the BLR was increased to 10.75% the plaintiffs interest was raised to 11.25%. The plaintiff said that the BLR is based on the BLR fixed by Bank Negara and is public knowledge.

[11] After the plaintiff was informed of the variation in interest rates, the defendant claimed that the plaintiff had not been regular in repaying. The defendant therefore wrote a letter to the plaintiff dated 12 November 1992 and 25 May 1993 informing the plaintiff that there was a balance of RM1,799.43 unpaid. The defendant also sent a letter dated 28 June 1993 through its solicitors claiming for the amount of RM3,313 that was due from the plaintiff. When the plaintiff failed to pay the amount due, the defendant instructed its solicitors to proceed with foreclosure proceedings. Charges incurred from the proceedings were to be borne by the plaintiff as provided in the loan agreement cum assignment.

[12] The defendant had on 14 January 1995 sent a letter through its solicitors made a demand on the plaintiff, followed by a letter dated 8 February 1995. Subsequent to that the plaintiff through a letter dated 13 February 1995 made a proposal for repayment and the defendant accepted the proposal by its letter dated 22 February 1995. The first payment under this new proposal was by a letter dated 13 February 1995. The correspondence is marked as 'CCY-6'. In view of this, the public auction was called off by the defendant.

[13] The plaintiff was then again found to have defaulted in repayment and the defendant had sent letters dated 1 June 1995, 25 August 1995, 16 August 1993 and 1 September 1995 to the plaintiff about this.

[14] Through its letter dated 15 December 1995, the defendant raised the instalment that was supposed to be paid by the plaintiff since she had not been making the repayment as scheduled regularly. The defendant claimed that at all material times the defendant had been complying with the Bank Negara rates. The defendant demonstrated this by exhibiting a letter dated 28 August 1995 ('CCY') that there was a reduction in interest rate from 11.25% to 1.25% with BLR (ie 8.95% at that time) at monthly rests.

[15] As for the plaintiff's allegation that she was turned away when she wanted to make repayment, the defendant replied that as soon as a loan not repaid and a 'Notice of Recall' of the entire loan is sent, as the defendant did by its solicitor's letter as in 'NL-9', the defendant is not obliged to accept any repayment save for the entire amount that is outstanding.

[16] The defendant reiterated that it is not reasonable to supply the plaintiff with the statement of account from the time that the plaintiff had taken the loan since the plaintiff was well aware that she still had to pay even if there is an increase in interest rate. If the repayment is not made according to schedule and there are arrears, late payment charges will be imposed and there will also be an increase in interest for the entire loan amount. The defendant stresses that a statement of accounts signed by two of its officers was conclusively agreed by the plaintiff and cannot be questioned.

[17] The defendant stated that it had incurred expenses in filing the suit in the sessions court. The summons was struck out by the sessions court judge when the learned judge refused to allow a postponement pending the disposal of the matter in this court.

[18] On 21 September 2005, the day that was fixed for the hearing the parties came before me, Mr Annon Xavier, learned counsel for the defendant informed me that he had advised his client to put off the public auction. Ms Jennifer Chandran, learned counsel for the plaintiff did not agree to a postponement and was desirous that the court grant her application in encl 4. Upon going through the plaintiff's application and the affidavits filed, and hearing learned counsels on both sides, I granted an order in terms of the plaintiff's application in encl 4.

[19] I did so because I felt that this is not a situation where the plaintiff had been in total neglect, default or failure to pay the instalments. The defendant in its own affidavit had admitted that the plaintiff had been paying. She had paid before and after the rights in Kwong Yik Bank Berhad was vested in the defendant. The payment had not been so regular when at one stage there was a variation in interest rate and at a later stage the instalment was increased. I believe there is a serious question to be tried in that the defendant had insisted time and again that it was not obliged to supply the plaintiff with the statement of accounts that she had requested. Instead the defendant is saying that it is the plaintiff who should have taken the trouble to keep

abreast of the appreciation and depreciation of interest rates. At one stage, the defendant had stated that it had done what is to be expected of it, in that the statement of accounts had been regularly sent and it is the plaintiff who should take action to point out any disparities to the defendant within 14 days from the receipt of the statement of accounts.

[20] I also find that the balance of convenience lies in favour of granting this injunction since the loss to the plaintiff's property if it were to be auctioned off could not be compensated by damages. On the other side of the divide, I think that the plaintiff is not being unreasonable in her claim for the defendant to supply her with the statement of accounts from the time that the loan was granted by Kwong Yik Bank Berhad. The statement of accounts if given would be a running account and it would show the status of the loan from its inception right until the current stage. The fact that the request is not unreasonable and not impossible to meet can be seen from the defendant's own words in its affidavit in reply. It had stated that preparation for the case took time because it had to retrieve all the files concerning the plaintiff's loan right from the time that she took it from Kwong Yik Bank Berhad. If the defendant can do that, I do not see why they cannot do the same in meeting the plaintiff's request for the statement of accounts. I agree with the plaintiff that in the absence of the detailed statement of accounts dating back to the time before the vesting took place, the auction, if it had been allowed to proceed, would not be right in law since the redemption statement would not be accurate.

[21] For the above reasons, I decided encl 4 in favour of the plaintiff with costs.

Plaintiff's application allowed.

Reported by Loo Lai Mee